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O.B. Oberhansly, Dennis Wilcox And Robert May v. Don B. Earle, Betty Earle And Rainbow Properties Corporation, A Utah Corporation : Defendants-Respondents Brief

Utah Supreme Court

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Robert M. McRae; Attorney for Appellants George E. Mangan; Attorney for Plaintiff

Oberhansly Reese C. Anderson; Attorney for Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

O. B. OBERHANSLY, DENNIS
WILCOX and ROBERT MAY,

Plaintiffs-Appellants,

vs.

Case No. 14820

DON B. EARLE, BETTY EARLE
and RAINBOW PROPERTIES
CORPORATION, a Utah cor-
poration,

Defendants-Respondents.

DEFENDANTS-RESPONDENTS BRIEF

APPEAL BY PLAINTIFFS-APPELLANTS FROM THE FOURTH DISTRICT
COURT OF UTAH COUNTY, THE HONORABLE J. ROBERT BULLOCK
PRESIDING.

REESE C. ANDERSON
Attorney for Defendants-Respondents
512 East 2nd South
Salt Lake City, Utah 84102

ROBERT M. McRAE
Attorney for Plaintiffs-Appellants
Wilcox and May
370 East Fifth South
Salt Lake City, Utah 84111

GEORGE E. MANGAN
Attorney for Plaintiff-Appellant
Oberhansly
P.O. Box 788
Roosevelt, Utah 84066

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STATEMENT OF POINTS

POINT I

WHERE THE TRIAL COURT FOUND NO CLEAR-CUT MEETING OF THE MINDS, THE CONTRACT BETWEEN THE PARTIES UNENFORCEABLE, AWARDED THE PLAINTIFF DAMAGES ON A QUASI-CONTRACTUAL BASIS, AND THE PLAINTIFFS-APPELLANTS IN THEIR BRIEF FAILED TO SHOW A CLEAR-CUT MEETING OF THE MINDS CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO SUSTAINING THE TRIAL COURT, THE TRIAL COURT SHOULD BE SUSTAINED.

POINT II

WHERE THE OFFER IS TO BUY DISTRIBUTORSHIP OF THREE BRANDS OF BEER AND TWO SOFT DRINKS IN TWO COUNTIES AND A PART OF A THIRD, AND PLAINTIFFS-APPELLANTS SELLERS PROVIDE "SIGNED AGREEMENTS WITH THE BEER COMPANYS TO SHOW THEY HAVE EXCLUSIVE RIGHT TO SELL IN THIS AREA," AND WHERE THE ONLY OTHER ASSETS OF VALUE ARE PRICED SEPARATELY AND WHERE THE ONLY TESTIMONY AT TRIAL SHOWS NUMEROUS DEMANDS FOR "EXCLUSIVE RIGHT TO SELL IN THIS AREA," AND THAT DEFENDANTS-RESPONDENTS WOULD NOT HAVE MADE PURCHASE EXCEPT FOR "EXCLUSIVE RIGHT," DID NOT CONSIDER CONTRACT CAME INTO BEING UNTIL PLAINTIFF-APPELLANTS PROVIDED "EXCLUSIVE RIGHT," ONE PLAINTIFF-APPELLANT AGREED TO CONTINUE LICENSE UNTIL SIGNED RIGHTS WERE DELIVERED, OTHER PLAINTIFF-APPELLANT MADE NO EXPLANATION FOR FAILURE TO DELIVER SIGNED AGREEMENTS, AND THIRD PLAINTIFF-APPELLANT DID NOT SHOW FOR TRIAL, IT WOULD BE ERROR TO HOLD THAT "SIGNED AGREEMENTS" AND "EXCLUSIVE RIGHT OF DISTRIBUTORSHIP" WERE NOT MATERIAL AND PLAINTIFFS-APPELLANTS GAVE ADEQUATE CONSIDERATION.

POINT III

WHERE PLAINTIFFS-APPELLANTS FAILED TO PERFORM CONDITIONS PRECEDENT OR CONCURRENT, OR, DID NOT GIVE THE CONSIDERATION BARGAINED FOR BY THE DEFENDANTS-RESPONDENTS AND THE TRIAL COURT AWARDED PLAINTIFFS-APPELLANTS

5616.05 EXCESSIVE DAMAGES TO MEET THE ONLY EVIDENCE OF ACTUAL LOSSES SHOWN UNDER POSSIBLE ANCILLARY TERMS OF A CONTRACT, IF THE TRIAL COURT DID ERR IN HOLDING THE CONTRACT AND THE ACTION OF THE PARTIES AMBIGUOUS, UNCERTAIN, CONFLICTING AND AMBIVALENT, SUCH ERROR WOULD BE HARMLESS AND DAMAGES TO THE PLAINTIFFS-APPELLANTS SHOULD BE REDUCED TO \$1424.88.

POINT IV

WHERE PLAINTIFFS-APPELLANTS FAILED TO GIVE THE DEFENDANTS-RESPONDENTS NOTICE OF NON-PAYMENT OF CHECKS OR DEMAND PAYMENT, DID NOT PROVE THE PLAINTIFFS-APPELLANTS RELIED ON CHECKS GIVEN, FAILED TO GIVE CONSIDERATION FOR CHECKS ISSUED, AND IT WOULD HAVE BEEN USELESS FOR THE DEFENDANTS-RESPONDENTS TO PERFORM PAYMENT OF THE CHECKS, THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT JUDGMENT ON THE CHECKS.

CASES AND AUTHORITIES

Court Decisions

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NATURE OF CASE

Plaintiffs-Appellants brought three causes of action on a contract for default and non-payment of checks given as a part of the transaction to which the Defendants-Respondents answered by denial and counterclaimed for Plaintiffs' failure to perform.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable J. Robert Bullock in the Fourth District Court of Uintah County without a jury. The court took the matter under advisement and subsequently issued a memorandum decision. In the memorandum decision the court found: Exhibit 5, "Earnest Money Receipt and Offer to Purchase" dated December 5, 1974, ambiguous, uncertain, conflicting and unenforceable as an agreement of the parties. The conduct of the parties subsequent to December 5, 1974, was also ambiguous and ambivalent. Collateral agreements and understandings which the parties attempted to reach subsequent to December 5, 1974, were loose, ambivalent and uncertain (R 100-101).

The trial court further found: The parties did create certain legal relationships in pursuance of an agreement, including the issuance of checks, promissory note, operation by Defendants Earle of the business of Great Basin Distributing Company, there was no change of directors, officers or the transfer of capital stock, inventory disposition. A balance of the equities would be achieved by an award to the Plaintiffs-Appellants in the sum of \$4040.93. That such amount was the value of the inventory on or about December 5, 1974. That there was no admitted or proffered evidence of fraud or deceit on the part of the Plaintiffs (R 100-101).

The findings of fact and conclusions of law in keeping with the

memorandum decision were entered (R 102-103). A judgment also was entered (R 104). Defendants-Respondents moved the court to correct the findings of fact, conclusions of law and judgment by reducing the amount of the judgment to \$2040.93 on the ground that the Defendants-Respondents Earle had already paid \$2000.00 (R109-110). This motion was granted and the findings of fact, conclusions and law and judgment were corrected with a final award to the Plaintiffs-Appellants of \$2040.93 (R 129-131, 133).

From the Amended Findings of Fact, Conclusions of Law (R 129-131) and Judgment (R 133), the Plaintiffs-Appellants appealed.

RELIEF SOUGHT ON APPEAL

Affirm the trial court. Reduce the amount of damages awarded to Plaintiffs-Appellants to \$1424.88.

STATEMENT OF FACTS

Mr. Earle, a Defendant-Respondent, first learned that Basin Distributing Company was for sale in November or October, 1974, in a discussion with Mr. Oberhansly, a Plaintiff-Appellant and a representative of United Farm Agency. At the time, Mr. Oberhansly told Mr. Earle that Basin Distributing Company had certain exclusive rights to distribute certain beers (TT 57).

As the result of negotiations on or about December 5, 1974, certain terms and conditions were integrated into an Earnest Money Receipt and Offer to Purchase form from which this law suit arose (Exhibit 5). Exhibit 5, dated December 5, 1974, recited that it was to the United Farm Agency,

Roosevelt, Utah. That in consideration of United Farm Agency using efforts to present an offer Betty Earle deposited \$500.00, beginning at line 5 of Exhibit 5, "to secure and apply on the purchase of the property situated at Duchesne and Uintah Counties and part of Wasatch and being the distributorship for Schlitz, Miller and Hamms Beer, R. C. Cola and Frostie Root Beer. Let it be known that this distributorship is trying to get A & W Root Beer and will pass these rights also."

Lines 2, 3 and 4 were filled in with "Betty Earle" and "\$500.00 in cash." Added in ink of the same color and shade on line 8 was "Possession will be given 12-6-74."

After that insertion on line 9 in a darker shade of blue ink, but more intense in color, was added the following, "All stock in Basin Dist Co. included."

The next insertion was typed at line 13 (Ex. 5). "No buildings or personal property being sold." Printed form at line 14 states, "The following personal property shall also be included as part of the property purchased;" And then there was typed, "All inventory that is on hand will be counted on December 6, 1974, and be paid for cash by buyer. This is not included as a part of the purchase price quoted." The number 6 was inserted after December, and the number 4 inserted after the 7 in 197__ was handwritten.

Lines 17 through 21 (Ex. 5) provided for a total purchase price of \$6000.00 with \$500.00 down and \$500.00 per month commencing January 10, 1975, with interest at the rate of 7% on the unpaid balance, and that the monthly payments included interest.

Then commencing at line 23 (Ex. 5) was typed: "\$6000.00 purchase price shall be treated as a note and mortgage on unpaid balance and will

still be owed regardless of what buyer does with dealership. Sellers will provide signed agreements with the Beer Companies to show they have exclusive right to sell in this area."

Lines 27 through 43 (Ex. 5) were followed with certain insertions and deletions handwritten with ink of the same color as others, except as noted, that were consistent with the general provisions as indicated above. On line 44, United Farm was inserted as being the broker company agent and this was by O. B. Oberhansly, one of the plaintiffs, a principal in the Basin Distributing Company corporation, and the negotiator for the Plaintiffs-Appellants.

On line 51 (Ex. 5) the date 12-5-64 was inserted, the signature of O. B. Oberhansly appears, and then there is an X on the right-hand side beginning about mid-page, and after the X, the signature, Betty Earle. On line 52 no date is inserted, but there appears the name of Dennis Wilcox, Secretary, and under that line is printed the name Dennis Wilcox. On the next signature line below line 52, which signature line was apparently inserted, appears the signature Bob May, and printed under the signature is the name Bob May.

It should be noted that the color of the ink and the intensity of the color of the signature and printed legend, "Bob May," is the same as the insertion on line 9, "All stock in Basin Dist Co. included."

On the right-half of the page, commencing at approximately line 52, (Ex. 5) there is typed in "Betty will assume all obligations after 12-6-74 and any bills already paid will be refunded to the sellers. Betty will pay sellers also for \$1000.00 deposit on truck. If Betty chooses to continue lease on truck." It should be noted that the word, "after," which follows obligations was inserted in ink and also the provision, "if Betty chooses to continue lease on truck," which insertions appear in the same

color and intensity of ink as the signature of Bob May and the insertion on lines 9 and 10, "all stock in Basin Dist Co. included."

Also inserted between lines 52 and 53 (Ex. 5) is the following recital, "Buyer may rent warehouse starting 12-6-74 for \$350.00 per month, payable in advance until he decides to move. After 8 (then an obliteration) months Sellers reserve right to change rent. Sellers will order electric put in by 12-5-74 and use rent money to pay for it." On line 55 appears the insertion "12-5-74."

On the 6th of December, 1974, on the basis of the "Earnest Money" agreement, an inventory was taken that was represented by Exhibit 11 (TT 59). This was an inventory of the warehouse only (TT 59).

On December 6, 1974, the Earles paid \$1500.00 in cash on the inventory (TT 64).

On December 6, 1974, Betty Earle made a check in the sum of \$350.00 payable to Basin Distributing Company upon which it was recited that it was for rent warehouse. This was check number 182 (Exhibit 9).

Also on December 6, 1974, Betty Earle prepared a check payable to O. B. Oberhansly in the sum of \$1540.93. This was check number 184 as appears in the upper right-hand corner of the check. The recital at the bottom in the lower left-hand corner of the check, "for Basin Distributing stock." (Ex. 2). The check in the sum of \$1540.93 (Ex. 2) was to be held by Mr. Oberhansly (TT 64).

Between December 6 and December 16 there were deliveries and also charges made against Basin Distributing Company which totalled \$1316.05 (TT 63).

A second inventory was made of the contents of the warehouse on December 16, 1974 (TT 61). The inventory at the warehouse had changed sub-

stantially between December 6 and December 16, 1974 (TT 62).

On December 16 or 17, 1974, Mr. Earle gave to Mr. Oberhansly a check on Rainbow Properties in the sum of \$1500.00, which check was a Rainbow Properties check, and \$40.93 in cash. The check was check number 450 (Ex. 4, TT 64). About mid-way on the right-hand side of Exhibit 4 it recited, "Basin Dist. Inventory PMT." Mr. Earle asked for the return of Mrs. Earle's check at the time he delivered Exhibit 4 (TT 67). Mrs. Earle's check was never returned. The request for the return of Mrs. Earle's check was made several times (TT 67).

Mr. Earle asked for signed agreements showing exclusive rights of distributorship on many occasions. He made the first request on December 6, 1974. Mr. Earle asked Mr. Oberhansly every time he saw Mr. Oberhansly and sometimes by phone for written evidence of the rights of distributorship (TT 82-83). Mr. Earle also asked Mr. May for written evidence of the rights of distributorship on December 6 or 7, 1974, at Mr. May's office in Vernal. Mr. May said that he did not have them but would get them. That Mr. May would secure those in writing for Mr. Earle (TT 83). Mr. Earle had not met Mr. Wilcox and consequently did not ask Mr. Wilcox for written evidence of exclusive rights of distributorship.

The distributorship rights were of primary importance to Mr. Earle (TT 82).

Mr. Earle had no prior experience with beer distributorships (TT 81).

Mr. and Mrs. Earle became discouraged as the result of not receiving the exclusive rights of distributorship and when Schlitz distribution folded, that finalized the business and the interest (TT 84).

The Earles had relied on the exclusive signed agreements for

distributorship of beers (TT 90).

The distributorship rights were the only reason that Mr. Earle bought the business (TT 81).

Mr. Earle testified: Without the exclusive rights of distributorship I'd never have bought the distributorship (TT 82).

The Earles never received any written evidence of signed agreement of exclusive rights of distributorship in the area (TT 70).

Mr. Earle again asked Mr. Oberhansly for evidence of the rights of exclusive distributorship after Schlitz deliveries were stopped (TT 84-85).

Mr. Earle last made the demand on Mr. Oberhansly for signed agreements with the beer companies to show they had exclusive right to sell in the area as recited in Exhibit 5 when Schlitz cancelled the beer. The purpose in asking was to see if there were any legal recourse to regain the distributorship of Schlitz (TT 88). This was about February 3, 1975 (TT 89).

Mr. Oberhansly never offered any explanation as to why he did not produce the written evidence of the rights of distributorship. Mr. Earle assumed it was procrastination (TT 84).

Mr. Earle employed a manager-driver in reliance upon the exclusive rights of distributorship (TT 90). The first delivery was made by the new driver employed by Mr. Earle on December 17, 1974 (TT 67). The Earles operated Basin Distributing Company from December 17, 1974, until February 3 or 10, 1975. After February 3, 1975, the distributing company which delivered or handled Schlitz Beer, Hamm's Beer and Millers Beer refused to make deliveries to Basin Distributing Company (TT 74).

The Earles did attempt to continue operation after February 3, 1975 (TT 75). The attempt was for less than two weeks (TT 76). The Earles stopped operating Basin Distributing Company after canvassing their

accounts and finding they could no longer operate profitably because Schlitz Beer accounted for the major portion of the sales and Basin Distributing Company could no longer get Schlitz Beer (TT 77).

Mr. Earle also testified (TT 104) at line 18, that no license was applied for "because Mr. Oberhansly said until they delivered the exclusive rights in writing that they would continue it in their own name, and I never considered I bought that business, and I've never had the stock transferred into my wife's or my name." The court: Never considered you bought it? The witness: No. I mean I never completed, never got the exclusive, never got the stock in our name. Nothing.

POINT I

WHERE THE TRIAL COURT FOUND NO CLEAR-CUT MEETING OF THE MINDS, THE CONTRACT BETWEEN THE PARTIES UNENFORCEABLE, AWARDED THE PLAINTIFF DAMAGES ON A QUASI-CONTRACTUAL BASIS, AND THE PLAINTIFFS-APPELLANTS IN THEIR BRIEF FAILED TO SHOW A CLEAR-CUT MEETING OF THE MINDS CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO SUSTAINING THE TRIAL COURT, THE TRIAL COURT SHOULD BE SUSTAINED.

In Build, Inc. v. Italasano, S Ct Ut, 1975, 398 P2d 544, this court sustained the trial court where the trial court found no clear meeting of the minds and no enforceable contract for building a house. And the trial court, to effect substantial justice in equity, on a quasi-contractual basis, awarded plaintiff a judgment for a sum less than the contract price. The Supreme Court considered the evidence in the light most favorable to the plaintiff in sustaining the trial court.

In Continental Bank and Trust Co. v. Bybee, S Ct Ut, 1957, 306 P2d 773, where the defendant asserted a defense against a note that had

been negotiated to the plaintiff, the court stated at page 776, in substance, that the intent of the parties to contract should be ascertained (1) from the four corners of the instrument itself, (2) from other contemporaneous writings concerning the same subject matter, and (3) from extrinsic and parole evidence of the intentions of the parties.

In this case it appears from the evidence that the Defendants-Respondents treated the transaction as the purchase of exclusive rights of distributorship of certain beers and soft drinks, inventory, an option to rent a building, and an option to lease a truck. The Plaintiffs-Appellants appear to have treated it as the sale of the inventory, rent of a warehouse, lease of a truck, and the purchase of a corporate shell without any particular assets or value; each item bearing a separate price.

Lines 5 though 8 of Ex. 5 provide, "To secure and apply on the purchase of the property situated at: Duchesne and Uintah Counties and part of Wasatch and being the distributorship for Schlitz, Miller and Hamms Beer and R. C. Cola and Frostie Root Beer. Let it be known that this distributorship is trying to get A & W Root Beer and will pass these rights also."

What was the distributorship? Lines 5 through 8 of Exhibit 5 can be construed as meaning the distributorship rights for the products named: Schlitz, Miller and Hamms Beer and R. C. Cola and Frostie Root Beer, and possibly A & W Root Beer. On line 17 of Exhibit 5, "Let it be known that this distributorship is trying to get A & W Root Beer and will pass these rights also," may be construed as giving some meaning to the term, distributorship, but when considered in the light of future wording, the question is, what meaning?

Next is recited on lines 8 and 9 of Exhibit 5, "possession will

be given 12-6-74." The testimony was actual possession not taken until December 16 or 17, 1974 (TT 64). Between December 6, 1974, and December 17, 1974, there was considerable change in inventory all of which took place as the result of continued operation by Plaintiffs-Appellants (TT 62). The recital and the acts of the parties are not consistent. This supports a conclusion of ambiguity.

Lines 9 and 10 of Exhibit 5 recite, "All stock in Basin Dist Co. included." Does this recital mean the stock in trade is included with phrase "possession will be given"? Does the phrase refer to the capital stock of Basin Distributing Company and it is included as a part of the transaction? Considering the testimony, lack of testimony at the time of trial, and the fact that no capital stock was ever transferred, there was confusion and ambiguity with respect to this recital, both in the agreement and the acts and conduct of the parties.

A check issued December 6, 1974, by Betty Earle in the sum of \$1540.93 recites in the lower left-hand corner, "for Basin Distributing Stock" (Ex. 2). This recital in the document supports the theory that lines 9 and 10 of Exhibit 5 were intended to refer to the stock in trade. This theory is further supported when the check (Ex. 2) is taken in conjunction with the amount of the inventory determined on December 6 as set out in the testimony at trial and as found by the trial judge, \$4040.93 (TT 59, Ex. 11, R 102).

Exhibit 4 contributes to the ambiguity in that said exhibit is a check of Rainbow Properties Corporation in the sum of \$1500.00 made payable to O. B. Oberhansly. This check, at about mid-point on the right-hand side, recites "Basin Dist. inventory PMT." The testimony at trial was that this check, together with the sum of \$40.93, was given to replace the check

issued by Mrs. Earle, Ex. 2 (TT 64, 67). These recital and checks add to the ambiguity.

Lines 14, 15 and 16 recite, "All inventory that is on hand will be counted on December 6, 1974, and be paid for cash by buyer. This is not included as a part of the purchase price quoted." The evidence at the time of trial established that the inventory was counted. That the amount in the warehouse arrived at was \$3040.93. The testimony further established at the time of trial that this was actually paid for by cash in the sum of \$1500.00 paid by Mr. Earle and a check in the sum of \$1540.93 given by Mrs. Earle (Ex. 2). Mrs. Earle's check was to be held and replaced by a check given by Mr. Earle. A post-dated check from Rainbow Properties Corporation in the sum of \$1500.00 (Ex. 4) and \$40.93 in cash were given to replace Mrs. Earle's check (TT 64, 67). This provision of Ex. 5 and the acts and conduct of the parties contribute to ambiguity.

Lines 23 through 26 of Exhibit 5 recite, "\$6000.00 purchase price will be treated as a note and mortgage on unpaid balance and will still be owed regardless of what buyer does with dealership. Sellers will provide signed agreements with the Beer Companys to show they have exclusive right to sell in this area." Here the word is dealership. Is there a difference between dealership on line 24 and distributorship on line 6 and distributorship on line 7 (Ex. 5)?

On lines 24, 25 and 26, Ex. 5, it is recited, "Seller will provide signed agreements with the Beer Companys to show they have exclusive right to sell in this area." At the time of trial Mr. McRae argued that there was no provision in the agreement that Exhibit 5 provided for written agreements. This writer argued that if they were signed, the inference was that they must be in writing. It is pointed out that all of the clarity that the

plaintiffs-Appellants contend for is not there.

Between lines 52 and 53 of Exhibit 5 on the right-hand side there is typed, with some changes in ink, "Betty will assume all obligations as of 12-6-74 and bills already paid will be refunded to sellers. Betty will pay sellers also for \$1000.00 deposit on truck. If Betty chooses to continue lease on truck."

The Plaintiffs-Appellants continued the business from 12-6-74 to 12-17-74, made charges against the company, made sales and kept receipts. What would be the effect? Were the Earles to cover their charges and shortages? Mr. Earle tried to work out an adjustment. Plaintiffs-Appellants did not cooperate. Again, the parties' acts and conduct add to ambiguity.

Who made the lease payments on the truck? Were all of the lease payments paid? These questions were unanswered by evidence at the time of trial. This leads to the conclusion of ambiguity.

Also between lines 52 and 53 there is recited, "Buyer may rent warehouse starting 12-6-74 for \$350.00 per month payable in advance until he decides to move. After eight months seller reserves right to change rent. Sellers will order electric put in by 12-6-74 and use rent money to pay for it." First of all, the term "may" is permissive. Actual possession and operation did not start until 12-17-74. The only precise date of termination of operation was February 3, 1975. Was the "electric" put in? Are the answers to these questions clear and unambiguous? Did the evidence or testimony at the time of trial help to clarify? It is the Defendants-Respondents' position that, again, the provision of Exhibit 5 and the acts and conduct of the parties do not lead to a conclusion of clarity, but lead to a conclusion of ambiguity.

Exhibit 2, a check for \$1540.93, was to be held. It is pointed

out that Exhibit 9, a check for rent, and Exhibit 2, both involved in the transaction, are made out to different payees. Exhibit 9, rent for the warehouse, was made payable to Basin Distributing. Exhibit 2, same date, same maker, was made payable to O. B. Oberhansly. The difference in payees supports the testimony that the check in the sum of \$1540.93, Exhibit 2, was to be held by Mr. Oberhansly. However, again, this does not contribute to clarity, but to ambiguity.

Exhibits 3 and 4 were both made payable to O. B. Oberhansly. This would tend to support the testimony that the checks were post-dated. However, this does not support the theory of clarity, but supports the conclusion of ambiguity of the documents and the acts of the parties.

In view of the following ambiguities in: (1) Does the use of "distributorship," "dealership," "exclusive rights," and "Seller will provide signed agreements," clarify the transaction? (2) What is the "stock" in Basin Dist. Co? Stock in trade? Capital stock? (3) Is "All stock in Basin Dist Co. included" stock in trade included in delivery of possession, or capital stock included in delivery of possession? (4) Do the payees of each of the checks clarify the transaction? (5) Does continued operation by Plaintiffs-Appellants with charges and reduction of inventory clarify? (6) What result should be reached on the rent of the warehouse? Did the Plaintiffs-Appellants clarify? (7) What actually happened to the deposit on the truck? (8) Were lease payments made and the lease in good standing when Plaintiffs-Appellants were using the truck? (9) Does the check to be held and the post-dated checks add to clarity or ambiguity? These questions and the lack of answers all support the holding of the trial court that the acts and conduct of the parties and the documents and ancillary agreements all contributed to ambiguity. It seems apparent they support the conclusion of ambiguity.

All of the foregoing considered in the light most favorable to the Defendants-Respondents support the conclusion of the trial court. The trial court should be sustained.

POINT II

WHERE THE OFFER IS TO BUY DISTRIBUTORSHIP OF THREE BRANDS OF BEER AND TWO SOFT DRINKS IN TWO COUNTIES AND A PART OF A THIRD, AND PLAINTIFFS-APPELLANTS SELLERS PROVIDE "SIGNED AGREEMENTS WITH THE BEER COMPANYS TO SHOW THEY HAVE EXCLUSIVE RIGHT TO SELL IN THIS AREA," AND WHERE THE ONLY OTHER ASSETS OF VALUE ARE PRICED SEPARATELY AND WHERE THE ONLY TESTIMONY AT TRIAL SHOWS NUMEROUS DEMANDS FOR "EXCLUSIVE RIGHT TO SELL IN THIS AREA," AND THAT DEFENDANTS-RESPONDENTS WOULD NOT HAVE MADE PURCHASE EXCEPT FOR "EXCLUSIVE RIGHT," DID NOT CONSIDER CONTRACT CAME INTO BEING UNTIL PLAINTIFF-APPELLANTS PROVIDED "EXCLUSIVE RIGHT," ONE PLAINTIFF-APPELLANT AGREED TO CONTINUE LI-CENSE UNTIL SIGNED RIGHTS WERE DELIVERED, OTHER PLAINTIFF-APPELLANT MADE NO EXPLANATION FOR FAILURE TO DELIVER SIGNED AGREEMENTS, AND THIRD PLAINTIFF-APPELLANT DID NOT SHOW FOR TRIAL, IT WOULD BE ERROR TO HOLD THAT "SIGNED AGREEMENTS" AND "EXCLUSIVE RIGHT OF DISTRIBUTORSHIP" WERE NOT MATERIAL AND PLAINTIFFS-APPELLANTS GAVE ADEQUATE CONSIDERATION.

The legal effect of failure of consideration can be: (1) none; (2) the award of damages; (3) legal excuse from counter-performance to the failure of consideration; (4) the injured party may not only recover damages for failure of consideration but be legally excused from his own counter-performance. The legal effect given to failure of consideration depends on whether or not the failure of consideration was material. Whether or not a failure of consideration is material is a question of fact for which there is no general rule; it is a question of fact in each case to be determined from the circumstances of each case.

In Prudential Federal Savings and Loan Association v. Hartford Accident and Indemnity Company, S Ct Ut, 1958, 325 P2d 899, where there was a failure to provide power for a short period of time to a construction site and such power lack did not prevent construction or substantially delay the project, it was held that it was severable and did not vitally change the transaction nor did it release the other party completely from performance, but gave such party a cause of action for damages.

However, in Paterson v. Intermountain Capital Corporation, S Ct Ut, 1973, 508 P2d 536, where the plaintiff was to mortgage certain land as security for a loan, the defendant was excused from performance where the plaintiff sold the land and was incapable of mortgaging the land. In that case the Plaintiff sold the land three months before a breach of contract by the defendant would have occurred and the defendant did not know of the breach until the action was filed.

It becomes essential to determine whether or not the failure of the Plaintiffs-Appellants to deliver signed agreements of exclusive rights to sell in the area was such a failure of consideration in view of the intent of the parties that it excused the Defendants-Respondents from performance. That the delivery of "signed agreements" was of essence and material to the contract is supported by the evidence.

In Exhibit 5, after a recital that consideration is deposited in the sum of \$500.00 in cash, the document, at line 5, the printed form continues: "To secure and apply on the purchase of the property situated at," after which is typed: "Duchesne and Uintah Counties and part of Wasatch and being the distributorship for Schlitz, Miller and Hamms Beer and R. C. Cola and Frostie Root Beer. Let it be known that the distributorship is trying to get A & W Root Beer and will pass these rights also." Then there is added in ink, "Possession will be given 12-6-74," and then in ink of a

different shade and intensity, "All stock in Basin Dist Co. included."

Underlining added.

Typed on Exhibit 5 at lines 14, 15 and 16 is the provision, "All inventory that is on hand will be counted on December 6, 1974, and be paid for cash by buyer. This is not included as a part of the purchase price quoted."

Typed on Exhibit 5 at line 23 is the provision: "\$6000.00 purchase price will be treated as a note and mortgage on unpaid balance and will still be owed regardless of what buyer does with the dealership. Sellers will provide signed agreements with the Beer Companys to show they have exclusive right to sell in this area." Underlining added.

Between lines 52 and 53 there is typed and written, "Betty will assume all obligations after 12-6-74 and any bills already paid will be refunded to the sellers. Betty will pay seller also \$1000.00 deposit on truck if Betty chooses to continue lease on truck." Portions underlined were hand written in ink.

The testimony: At the time of trial Mr. Wilcox stated that the bank account that Basin had with Zions would be continued by Plaintiffs and that such continuance would be to deposit the moneys that came in from the sale of the business and the accounts receivable that were to come in (TT 41).

Mr. Earle at the time of trial testified that he had no prior experience with beer distributorships (TT 81).

The distributorship rights were the only reason Mr. Earle bought the business (TT 81).

The distributorship rights were of primary importance to Mr. Earle (TT 82).

Without the exclusive rights of distributorship Mr. Earle would never have bought the distributorship (TT 82).

Mr. Earle asked for signed agreements showing exclusive rights of distributorship on many occasions. He made the first request on December 5, 1974 (TT 82).

Mr. Earle asked Mr. Oberhansly every time he saw Mr. Oberhansly and sometimes by phone for written evidence of the rights of distributorship (TT 82-83).

Mr. Earle also asked Mr. May for the written evidence of the rights of distributorship on December 6 or 7, 1974, at Mr. May's office in Vernal. Mr. May said that he did not have them but that he would get them. That Mr. May would secure those in writing for Mr. Earle (TT 83).

Mr. Earle asked Mr. Oberhansly for evidence of the rights of exclusive distributorship after Schlitz deliveries were stopped (TT 84-85).

Mr. Earle last made the demand upon Mr. Oberhansly for signed agreements with the beer companies to show they had exclusive rights to sell in the area when Schlitz cancelled the beer. The purpose in asking was to see if there were any legal recourse to regain the distributorship of Schlitz (TT 88).

Mr. Earle testified at the time of trial (TT 103) with respect to the application for license and by way of why no application was made for the license, at line 17, that no license was applied for "because Mr. Oberhansly said until they delivered the exclusive rights in writing that they would continue under their license. I give him \$60.00 to pay the bond himself and to continue it in their own name, and I never considered I bought that business, and I've never had the stock transferred into my wife's or my name." The court: Never considered you bought it? The witness: No. I mean I never completed, never got the exclusive, never got the stock in

our name. Nothing.

And at (TT 103-104) when asked why no licenses had been applied for, Mr. Earle testified at TT 104, line 18, "because Mr. Oberhansly said that he'd consent, we'd hire the driver, continue driving the stuff until such time as the exclusive franchise was delivered, then we could decide whose name to put the license in. And it was just called the license. I don't know any of the details required. Due to the fact of a juvenile situation I knew that I would not be able to participate in, and, therefore, did not take any stock in my name. I did not -- I was not interested. We were looking for a family business with cash flow, and my wife was either going to have it or someone else. And it was never --."

To say that the "Sellers will provide signed agreements with the Beer Companys to show they have exclusive right to sell in this area" is not of essence is to ignore the written documents and to ignore all of the testimony at the time of trial.

When Exhibit 5 is examined, and more particularly lines 5 through 10, it can be seen that the parties were dealing with distributorship rights. The area of Duchesne and Uintah Counties and part of Wasatch is described. The distributorship is for Schlitz, Miller and Hamms Beer and R. C. Cola and Frostie Root Beer. It is also stated that the distributorship is trying to get A & W Root Beer and will pass these rights also. These provisions were typed.

By virtue of position and the manner in which it is written, i.e., by hand, the date of possession was an afterthought.

Again, the position and the manner of writing, i.e., "All stock in Basin Dist Co. included," was also an afterthought. This statement follows the handwritten statement with respect to possession and the type-written statement with respect to distributorship rights. It is also in a

different shade and intensity of ink. This indicates that the consideration of stock was also an afterthought.

Since the reference is to stock only, it could have referred to the stock in trade or the capital stock. This was not spelled out in the writing. These facts give weight to the conclusion that the thing for which the Defendants-Respondents were bargaining was the distributorship rights and not the capital stock of Basin Distributing Company.

That the reference could have been to "stock in trade" is supported by Exhibit 2, check #184 signed by Betty Earle, on which is recited in the lower left-hand corner, "For Basin Distributing Stock." This check was considered by all and recognized by all at the time of trial to be a check given for stock in trade to be held until replaced.

Next, part of line 24 and lines 25 and 26 of Exhibit 5 should be considered. There it is recited, "Sellers will provide signed agreements with the Beer Companies to show they have exclusive right to sell in this area." When considered in the light of all the facts and circumstances in the case, it appears that the importance was attached to the exclusive rights of sale and not to the dealership or to the stock in Basin Distributing Company. The parties were dealing with the rights of sale as being of value and dealership as being of little or no value.

A separate provision was made for pricing the inventory; continuation of the lease of the truck; and rent of the warehouse. The payment of the sum of \$6000.00 was for something to be delivered by the Plaintiffs-Appellant Sellers. The stock in Basin Distributing Company and disposition of the dealership were afterthoughts, assumptions of Plaintiffs-Appellants' counsel, and casual matters. The only thing of value to be exchanged for the \$6000.00 was the exclusive rights of distributorship. The significance

of this double exchange is that failure to deliver "signed agreements with the Beer Companys to show they have exclusive right to sell in this area" is a failure of consideration.

The failure to deliver the exclusive rights of sale went to the essence of the contract and the Defendants-Respondents were entitled to recover damages for the failure and were excused from giving their own counter-performance.

The testimony of Mr. Earle at the time of trial was direct and unequivocal that the exclusive rights of sale were the primary thing for which the Defendants-Respondents bargained (TT 81-82). Further, his testimony was to the effect that until he received such rights the transaction was not consummated (TT 103).

Mr. Oberhansly sat in the courtroom throughout the testimony of the Defendants-Respondents. Mr. Oberhansly was a plaintiff in the action, a party of interest in the corporation, and the primary negotiator of the contract. At no time did he take the stand to offer any explanation or denial of any of the testimony of Mr. Earle. He stood mute.

Mr. Oberhansly is not a party to this appeal.

Mr. Wilcox, a principal and officer in Basin Distributing Company, a party plaintiff to the action, and one of the witnesses at the time of the trial did not deny, explain or otherwise overcome the only conclusion that can be reached from both the documentary evidence and the testimony of the Defendants-Respondents that the rights of sale in the area were of essence to the contract and the primary consideration to be given by the Plaintiffs-Appellants to the Defendants-Respondents in return for the payment of the sum of \$6000.00.

Mr. May, a principal in Basin Distributing Company, an officer in the company, and one of the plaintiffs in this action, did not attend the

trial. Exhibit 5 was certainly available to him. It is apparent on the face of Exhibit 5 that sales rights were certainly a subject of consideration in the transaction.

No one offered evidence or contended at the time of trial that the capital stock in Basin Distributing Company had any monetary value whatsoever. That the capital stock was bargained for was an assumption of counsel for Plaintiffs-Appellants. The accounts receivable were to be retained by Basin Distributing Company. The inventory was to be paid for separately. The warehouse rent was to be paid for separately. The truck, if the lease were to be continued by the Defendants, was to be paid for by the payment of \$1000.00 on deposit, apparently with the lessors to the Plaintiffs. The only thing of value that can be considered as being required as consideration for the payment of the sum of \$6000.00 is the exclusive rights of sale of beer in the area defined in Exhibit 5.

The failure of the Plaintiffs-Appellants to deliver signed agreements with the beer companies showing exclusive rights of sale in the area of Duchesne, Uintah and part of Wasatch Counties was a failure of consideration that would excuse the performance by the Defendants-Respondents of the payment of \$6000.00. Such a failure of consideration would also be the grounds for the award of damages to the Defendants-Respondents. The denial of the receipt of evidence showing the damages of the Defendants-Respondents was on the basis of hearsay evidence. Such was not the fact with respect to the failure of consideration and excuse from performance by the Defendants-Respondents. It would be error to hold that there was sufficient consideration and performance to uphold the enforcement of the agreement for the Defendants-Respondents to pay the sum of \$6000.00.

POINT III

WHERE PLAINTIFFS-APPELLANTS FAILED TO PERFORM CONDITIONS PRECEDENT OR CONCURRENT, OR, DID NOT GIVE THE CONSIDERATION BARGAINED FOR BY THE DEFENDANTS-RESPONDENTS AND THE TRIAL COURT AWARDED PLAINTIFFS-APPELLANTS \$616.05 EXCESSIVE DAMAGES TO MEET THE ONLY EVIDENCE OF ACTUAL LOSSES SHOWN UNDER POSSIBLE ANCILLARY TERMS OF A CONTRACT, IF THE TRIAL COURT DID ERR IN HOLDING THE CONTRACT AND THE ACTION OF THE PARTIES AMBIGUOUS, UNCERTAIN, CONFLICTING AND AMBIVALENT, SUCH ERROR WOULD BE HARMLESS AND DAMAGES TO THE PLAINTIFFS-APPELLANTS SHOULD BE REDUCED TO \$1424.88.

The document and the acts of the parties that is the subject of litigation was an offer made by the Earles, Defendants-Respondents, under date of December 5, 1974 (Ex. 5). This offer was accepted by Messrs. Oberhansly, Wilcox and May, Plaintiffs-Appellants. Under that offer Defendants-Respondents tendered the performance of certain acts: delivery of the down payment of \$500.00, which also constituted a monthly payment. Upon acceptance, the Plaintiffs-Appellants were then to perform acts: the Plaintiffs-Appellants were to deliver on December 5, 1974, the "distributorship for Schlitz, Miller and Hamms Beer and R. C. Cola and Frostie Root Beer." There was to be a delivery of rights acquired in the future, A & W Root Beer. All stock in Basin Distributing Company was to be delivered (lines 9 and 10, Ex. 5). The kind of stock, in trade or capital, was not defined. The parties were to count all inventory on hand on December 6, 1974. Defendants-Respondents were to pay cash for the inventory (lines 14, 15 and 16, Ex. 5). The Defendants-Respondents were to: give a note for the purchase price (lines 20-24, Ex. 5). The Plaintiffs-Appellants were to: "Provide signed agreements with the Beer Companys to show they have exclusive right to sell in this area" (lines 24, 25 and 26, Ex. 5) Delivery of these documents was

to have been on December 6, 1974, as again recited on line 29 of Exhibit:

The respective parties performed on December 6, 1974, to the following extent: The parties took inventory of the warehouse, but not the truck (TT 59). Defendants-Respondents (1) delivered \$1500.00 cash in payment on the inventory (TT 64); (2) gave a check in the sum of \$1540.93, which check was to be held until another check was given to replace it (TT 64); (3) gave \$500.00 in cash toward the \$6000.00 purchase price (TT 59); and (4) gave a note in the sum of \$5500.00 to Plaintiffs-Appellants to be paid at the rate of \$500.00 per month (Ex. 1).

Plaintiffs-Appellants continued operation of the business until December 17, 1974, sold from the inventory and incurred additional claims.

The Plaintiffs-Appellants did not perform the condition, "Sellers will provide signed agreements with the Beer Companys to show they have exclusive right to sell in this area." (Lines 24, 25 and 26, Ex. 5).

The distributorship rights were the only reason that Mr. Earle bought the business (TT 81). The distributorship rights were of primary importance to Mr. Earle (TT 82). Without the exclusive rights of distributorship Mr. Earle would never have bought the distributorship (TT 82). Mr. Earle asked for signed agreements showing exclusive rights of distributorship on many occasions. He made the first request on December 6, 1974 (TT 82). Mr. Earle asked Mr. Oberhansly every time he saw Mr. Oberhansly and sometimes by phone for the written evidence of the rights of distributorship (TT 82-83).

Mr. Earle also asked My May for written evidence on the rights of distributorship on December 6 or 7, 1974, at Mr. May's office in Vernal. Mr. May said that he did not have them but would get them. That Mr. May would secure those in writing for Mr. Earle (TT 83).

Mr. Earle had not met Mr. Wilcox and consequently did not ask Mr. Wilcox for written evidence of exclusive rights of distributorship (TT 84).

Mr. Oberhansly offered no explanation as to why he did not produce the signed agreements with the beer companies. Mr. Earle assumed it was procrastination (TT 84). As the result of this failure to deliver the signed agreements showing exclusive rights of distributorship with certain beer companies, Mr. Earle testified that he considered the contract never came into existence and that the Defendants never really took over (TT 103-105).

No evidence was given at the time of trial to explain failure. Mr. Oberhansly, present at the trial, did not deny any part of the Defendants' testimony.

This failure to deliver signed agreements with the beer companies of exclusive rights of distributorship can be viewed as follows: (1) Failure to perform a condition precedent; (2) Failure to perform a condition concurrent; or, (3) That there was a failure of consideration.

If the failure to deliver "signed agreements with the Beer Companies to show they have exclusive right to sell in this area" is the failure to perform a condition precedent, no contract came into existence.

If the failure to deliver "signed agreements with the Beer Companies to show they have exclusive right to sell in this area" is the failure to perform a condition concurrent with the delivery of the note and the \$500.00 as down payment on the distributorship, then the Defendants-Respondents were excused from further performance because of failure to perform a condition concurrent.

If the view is adopted that the failure to deliver the "signed agreements with the Beer Companies to show they have exclusive right to sell in this area" is the failure of consideration, then the Defendants-Respondents are excused from performance by failure of consideration. That the "signed agreements" were material is pointed out above by Mr. Earle's testimony which

was not rebutted in any way.

That the Plaintiffs Wilcox and May recognized this term of the contract, i.e., "signed agreements with the Beer Companies to show they have exclusive right to sell in this area" is evidenced by their Reply to the Defendants' Counterclaim (R 11), more particularly, paragraph 2 of said Reply, which states "Admit paragraph 2 and Plaintiffs further allege that said signed agreements were in fact delivered to the Defendants in the form of United States Government License, which in the industry acts as the exclusive right to sell document or documents, as the case may be, with the subject beer companies." This allegation was neither supported by evidence or argument by the Plaintiffs Wilcox and May at the time of trial.

The Plaintiff Oberhansly, in his Reply, "Answer of O. B. Oberhansly to Counterclaim" (R 17) recognized the provision in the contract but then attempted to explain it away. Mr. Oberhansly did not even take the stand during the trial even though he was present at all times. Nor did Mr. Oberhansly deny the demands made on him by Mr. Earle.

If the view is taken that there is severability and that the foregoing disposes of the purchase of the distributorship, then consideration might be given to the cost of the inventory, rent of the warehouse and the truck. However, it should be noted that neither the warehouse nor the truck were of any use to the Defendants-Respondents unless they had the distributorship. Or, at least they were not forced out of business by the lack of a product to sell that was saleable in the market.

In considering the inventory the trial judge did award the sum of \$4040.93 with interest at the rate of 8% per annum from February 11, 1975, that amount being the value of the inventory on or about December 5, 1974 (R 101). Against this was subsequently allowed the sum of \$2000.00, which sum was represented by an allowance of \$1500.00 cash paid on the inventory

and the \$500.00 cash paid on the distributorship.

The allowance of \$2000.00 did not make allowance for the shortages of the inventory and purchases and sales that occurred between December 6, 1974, and December 16 or 17, 1974. The shortages totalled \$1316.05 (TT 63). The benefits of these deliveries and the shortages of inventory did not inure to the benefit of the Defendants-Respondents. These shortages were not mentioned by the trial court at the time.

If the view is taken that the warehouse was severable from the rest of the contract, then the rent for the month of January, i.e., from January 6 to February 6, would have been more than offset by the shortage of inventory. This allowance would have been consistent with the testimony of Mr. Earle that the Earles operated Basin Distributing Company from December 17, 1974, until February 3, 1975, at which time Gateway Distributing Company, which delivered or handled Schlitz Beer, Hamm's Beer and Miller's Beer, refused to make deliveries to Basin Distributing Company (TT 74). The only subsequent activities of the Earles was the Earles' attempt to continue operation after February 3, 1975, after canvassing their accounts and finding that they could no longer operate profitably because Schlitz Beer accounted for the major portion of their sales and Basin Distributing Company could no longer sell Schlitz Beer (TT 76-77).

In considering the severability of the arrangements with respect to the truck, there was an addition to Exhibit 5 which provided "Betty will pay sellers also for \$1000.00 on truck. If Betty chooses to continue lease on truck." This provision was at the option of the Earles. There was no testimony or evidence submitted at the time of trial as to (1) the amount of the rental for the truck, (2) the cause of the loss of the truck or repossession, or (3) whether or not the \$1000.00 deposit was forfeited for any reason attributable to the acts of the Defendants-Respondents. Insofar

as the evidence submitted at the time of trial was concerned, the Plaintiffs-Appellants may have been able to recover their \$1000.00 deposit from the lessor of the truck except for Plaintiffs-Appellants' own acts or omissions. The only evidence at trial was Mr. Wilcox when he testified that he, Mr. Wilcox, did not receive the \$1000.00 described in Ex. 5 (TT 45).

Again, with respect to the severability of the provision of Exhibit 5 with respect to the truck, the shortage of the inventory after December 6, i.e., on December 16 or 17, may have more than offset any loss of rental paid or to be paid on the truck.

Exhibit 5 failed as a contract between the parties because of the failure to perform a condition precedent or concurrent by delivery of "signed agreements with the Beer Companies to show they have exclusive right to sell in this area" or as a failure to perform the same condition as a condition concurrent. Furthermore, performance by the Plaintiffs-Appellants failed for a lack of consideration for failure to deliver "signed agreements with the Beer Companies to show they have exclusive right to sell in this area."

That the provision for "signed agreements" was material both as a condition precedent, concurrent, or as consideration was the abundant testimony of Mr. Earle about demands for "signed agreements," and Mr. Earle's testimony that the contract never came into existence as the result of failure to deliver "signed agreements" (TT 103-105). Yet, at no time did Mr. Oberhansly take the stand and deny any part of the testimony with respect to his conversation with Mr. May. It is recognized that Mr. May was absent at the time of trial. However, had he been interested in pursuing his rights, he would have been present.

The trial court action is further supported by the fact that the discrepancy or deficiency in the inventory would more than offset any shortage in the rent.

Further, the shortage in inventory and the additional charges against the company between December 6 and 16 or 17, 1974, may have more than offset any loss of the deposit on the truck as the result of any acts of the Defendants-Respondents. There was no evidence at the time of trial of the actual pecuniary loss by the Plaintiffs-Appellants with respect to the truck as the result of any acts of the Defendants-Respondents. The only testimony at trial was that Mr. Wilcox did not receive the \$1000.00 deposit (TT 45). Others could have received the \$1000.00. The deposit may have been lost because the Plaintiffs-Appellants were in default on the lease.

Assuming the contract might have been clear and unambiguous, Plaintiffs-Appellants did not meet the conditions precedent, concurrent or perform materially by delivering a distributorship with "signed agreements." Furthermore, the Plaintiffs-Appellants received more than adequate compensation for those parts of the contract that might be considered severable. If the trial court erred in holding the contract and actions of the parties ambiguous, uncertain, conflicting and ambivalent, it would be harmless error. That it was harmless error can be seen when the monetary value of actual losses established are considered:

Inventory 6 Dec 74	\$4,040.93
Less Shortages (TT 63)	<u>1,316.05</u>
Net Inventory	2,724.88
Rent from 17 Dec 74 to 17 Feb 75 @ \$350.00 per mo. (Ex. 5)	<u>700.00</u>
	3,424.88
Less total payments	<u>2,000.00</u>
Actual Loss by Plaintiffs-Appellants	1,424.88
Damages Awarded	<u>2,040.93</u>
Excess Damages	\$616.05

POINT IV

WHERE PLAINTIFFS-APPELLANTS FAILED TO GIVE THE DEFENDANTS-RESPONDENTS NOTICE OF NON-PAYMENT OF CHECKS OR DEMAND PAYMENT, DID NOT PROVE THE PLAINTIFFS-APPELLANTS RELIED ON CHECKS GIVEN, FAILED TO GIVE CONSIDERATION FOR CHECKS ISSUED, AND IT WOULD HAVE BEEN USELESS FOR THE DEFENDANTS-RESPONDENTS TO PERFORM PAYMENT OF THE CHECKS, THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT JUDGMENT ON THE CHECKS.

Sec. 7-15-1, UCA (1953): (1) Establishes a cause of action for an insufficient funds check. (2) Provides for the award of damages in amount of check, costs of collection, court and attorneys fees.

Sec. 7-15-2, UCA (1953): Provides for prima facie evidence of intent to defraud when proof is made of issuance of check where there were insufficient funds and within a reasonable time and after notice the check was not good.

Sec. 7-15-3, UCA (1953): Provides for notice.

These sections provide for notice by payees or holders in due course and do not eliminate defenses against the makers of checks issued against insufficient funds where the deficiencies are not made good.

In *Stanford Petroleum v. Janssen*, S Ct Ut, 1949, 209 P2d 932, where the defendant claimed the trial court erred in dismissing its counterclaim, the Supreme Court sustained the trial court and held that the defendant could not perform the assignment of a state lease and that the plaintiff's performance was thereby excused. At page 936 the court quotes from the re-statement of the law of contracts which is here paraphrased, that no man is compelled to do a useless act, and if performance of a condition will not be followed by performance of a promise, it is useless for the intended purpose and it is therefore unnecessary to perform the condition, and a promise, in judging whether performance of a condition will not be followed

by performance of a promise, is justified in taking the other party at his word.

The Plaintiffs-Appellants complain of three checks. The first check was a check dated December 6, 1974, in the sum of \$1540.93, which check was issued by Betty Earle (Ex. 2). Plaintiffs-Appellants also complain about a check dated January 6, 1975, check number 449 of Rainbow Properties Corporation, in the sum of \$850.00, which recited warehouse rent \$350.00 and January payment \$500.00 (Ex. 3). Also complained about was a check dated January 6, 1975, in the sum of \$1500.00, which was check number 450 of Rainbow Properties Corporation and made payable to O. B. Oberhansly (Ex. 4).

The Plaintiffs-Appellants in their complaint in paragraphs 4, 5 and 6 of their second cause of action (R 3) allege notice of dishonor and failure to make payment within ten days. They also allege fraud, and entitlement to reasonable attorney's fees to recover on fraudulent checks. The Defendants-Respondents in their Answer denied the allegations set out in the second cause of action as paragraph 4, 5 and 6 (R 6).

No evidence was presented that notice was given the Defendants-Respondents as required by the statute.

The evidence at the time of trial was that the check in the sum of \$1540.93 (Ex. 2) was issued by Mrs. Earle and was to be held by Mr. Oberhansly and replaced by a different check (TT 64). The evidence at the time of trial was that on December 16 or 17, 1974, Mr. Earle gave to Mr. Oberhansly a check on Rainbow Properties in the sum of \$1500.00 (Ex. 4, TT 64). Mr. Earle asked for the return of Mrs. Earle's check at the time he delivered Exhibit 4 (TT 67). Mrs. Earle's check was never returned (TT 67). The request for the return of Mrs. Earle's check was made several times (TT 67). Defendants-Respondents were excused from performance on

this check by failure to return the check, i.e., the failure to perform a condition.

The inventory at the warehouse was changed substantially between December 6 and December 16 (TT 62). Also, between December 6 and December 16, there were deliveries and charges made against Basin Distributing Company (TT 63). The total deficiency of inventory with additional deliveries to Basin Distributing Company was \$1316.05 (TT 63). The only discussion of adjustment of inventory based on the deficiency on December 16, 1974, was with Mr. Oberhansly (TT 67). No agreement was reached with respect to an adjustment in the inventory and the matter was in limbo. Payment of Exhibit 4, a check for \$1500.00, is excused by failure to return Mrs. Earle's check and agreement on the inventory.

Exhibit 3, dated 1-6-75, in the sum of \$850.00, was a Rainbow Properties Corporation check number 449. This check was payable to Mr. Oberhansly. The recital on the check was "rent \$350.00 for January and January payment of \$500.00." Payment on this check is excused by change of date of possession, no delivery of exclusive rights of distributorship and changes in inventory for which no adjustment had been made. The contract, if there ever was one, had broken down.

The situation as it existed on January 6, 1975, was as follows: Mrs. Earle had not received her check returned to her. The Earles had received no written evidence, signed or otherwise, which was evidence of exclusive rights of distributorship as recited in the agreement as evidenced by Exhibit 5, lines 24, 25, 26 and 29.

Furthermore, the inventory was in limbo as shown above.

Payment of the checks would have been a useless act.

Plaintiffs-Appellants Wilcox and May argue that the agreements are severable. Exhibit 5 recites that continuation of the rental of the

property and the lease of the truck is at the option of the buyer. The example of twenty used cars, used in Plaintiffs-Appellants' Brief to illustrate when a contract for the purchase of said cars might be severable, is not analogous to the case at hand. Here the situation is comparable to a contract for a car with no engine, the business to keep it going. Here the Defendants-Respondents would need the warehouse only if they continued the operation of the distributorship, and their continuation of the rental was at their option. By January 6, 1975, it was apparent that they had not reached agreement as to the deficiencies in the inventory, that the evidence of the exclusive rights of distributorship from the beer companies had not been received, and consequently the continuation of the distributorship might not have any value.

It is also argued by Plaintiffs-Appellants that the lease of the truck, or continuation of the lease of the truck, was severable. The truck had originally been leased and was used for the distributorship. The only use for the truck by the buyers would have been for the continuation of the distributorship. Even the continuation of the lease of the truck was at the option of the buyers. It was only if they exercised their option to continue the lease that they would pay to the Plaintiffs-Appellants the \$1000.00 deposit on the truck. Defendants-Respondents had no opportunity to continue the lease or the business.

In summary, the Plaintiffs-Appellants offered no evidence or notice of non-payment as required by statute. Nor did they prove the performance of conditions precedent, the furnishing of agreed consideration, nor, in fact, did they show any reliance upon the checks. It is also apparent from the facts that performance by the Earles would have been a useless act by the Earles as the Plaintiffs-Appellants were not ready, willing or able to give performance of the consideration they were to give for payment of the checks. The trial court should be sustained.

SUMMARY

When the evidence is considered in the most favorable light to the Defendants-Respondents it is apparent that Exhibit 5 is ambiguous, uncertain, conflicting and consequently unenforceable as an agreement of the parties. That the collateral agreements and undertakings which the parties attempted in pursuit of an agreement subsequent to December 5, 1974, were loose, ambivalent and uncertain. That the conduct of the parties subsequent to December 5, 1974, in pursuit of an agreement, including the issuance of checks, operation of the business, failure to change directors or transfer the capital stock were also ambiguous and ambivalent.

In view of the foregoing, the trial court should be sustained in its decision.

The failure of the Plaintiffs-Appellants to provide the Defendants-Respondents with "signed agreements with the Beer Companys to show they have exclusive right to sell in this area," the area of Duchesne and Uintah Counties and part of Wasatch County, for Schlitz, Miller and Hamms Beer and R. C. Cola and Frostie Root Beer, was a failure of consideration which was material and excused the Defendants-Respondents from performance.

The trial court's allowance of damages in the amount of \$2040.93 was reached with less precision than could be achieved on the record. Considering the evidence in the light most favorable to Defendants-Respondents the damages should be reduced to \$1428.88. This award allows for inventory shortages and any claim for rent of the warehouse the Plaintiffs-Appellants might have.

The trial court should be sustained in not allowing recovery on the checks. There was no evidence to the Defendants-Respondents as required by the statute. The evidence fully established that payment of the checks

would have been a useless gesture on the part of the Defendants-Respondents. The Plaintiffs-Appellants could not or would not provide signed agreements with the beer companies to show they had exclusive right to sell in the area of Duchesne, Uintah and part of Wasatch Counties of Schlitz, Miller, and Hamms Beer and R. C. Cola and Frostie Root Beer.

The trial court observed the witnesses, heard the evidence, heard the arguments, and when the evidence is considered in the light most favorable to the Defendants-Respondents on appeal, the trial court should be sustained.